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SUPREME COURT, U.S.

Supreme Court of the United States

October Term, 1961

No. 1093

Thomas Dennis McCauley,

Petitioner,

vs.

State of California,

Respondent.

Brief of Respondent in Opposition to Granting Writ of Certiorari

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IN THE

Supreme Court of the United States

October Term, 1963

No. .....

ROBERT DONNELL MCCREERY,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

Brief of Respondent in Opposition to Granting Writ of Certiorari.

Statement of the Case.

Petitioner was convicted in the Municipal Court of Los Angeles Judicial District, State of California for a violation of Subdivision (a) of Section 647 of the Penal Code of the State of California.

The material portion of section 647 reads as follows:

> "Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor:
>
> (a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view". (Stats. 1961 ch. 560, sec. 2, p. 1672)

Petitioner appealed the judgment of conviction to the Appellate Department of the Superior Court of Los Angeles County. That court affirmed the judgment of conviction without opinion. Petitioner then filed a Petition for Rehearing and for Certification to the District Court of Appeal of the State of California, Second Appellate District. This Petition was denied on January 29, 1964.

Petitioner now seeks certiorari in this court on the grounds that he was denied the due process and equal protection afforded by the 14th Amendment to the Constitution of the United States.

Statement of the Evidence.

On the night of the petitioner's arrest the arresting officer was eating at a local drive-in restaurant. During his meal the officer used the restroom located on the parking lot of the drive-in. [Rep. Tr.* p. 3, lines 5-19; p. 6, lines 1-5] The restroom is a small separate building containing a urinal and a commode. The commode is enclosed within a separate partition that has a door. [Rep. Tr. p. 6, lines 21-26.] Upon entering the restroom the officer walked directly to the urinal. [Rep. Tr. p. 11, line 12.] Some thirty seconds later he heard "moaning" and "rattling" sounds coming from within the partition. [Rep. Tr. p. 5, line 26; p. 5, lines 20-21; p. 7, lines 13-17.] The officer stepped back from the urinal, and was able to see the petitioner through the open door of the partition, face to face and approximately three feet away. [Rep. Tr. p. 7, lines 20-26; p. 8, lines 1-2; p. 8, lines 13-15.]

*Reporter's Transcript refers to the original Reporter's Transcript which is on file in the Appellate Department of the Superior Court for Los Angeles County.

The officer then testified, "I observed the defendant seated on the commode. With his left hand he had the door. He had it pulled back, as I said, approximately ten to twelve inches and he was masturbating his erected and exposed penis." [Rep. Tr. p. 8, lines 7-10.]

The officer observed this activity for five or six seconds. [Rep. Tr. p. 13, lines 17-19.] Apparently the petitioner realized that this person watching him was a police officer and he closed the door. [Rep. Tr. p. 13, lines 17-19.] The officer pushed open the door and told the petitioner to come out. [Rep. Tr. p. 8, lines 25-26.] The petitioner was then arrested and taken to the police station. [Rep. Tr. p. 33, lines 16-26.]

I.

The Evidence of the Petitioner's Guilt Was Sufficient to Sustain the Judgment of Conviction.

Where, as here, an attack is made upon the sufficiency of the evidence, a California Appellate Court is bound by the long-standing rule that a decision must be affirmed unless it is clear that upon no hypothesis whatever is there "sufficient substantial evidence" to support the conclusion of the trial court.

People v. Newland, 15 Cal. 2d 678, 104 P. 2d 778.

The petitioner contends not only was there a lack of "sufficient substantial evidence" to support the decision below, but that the record is totally devoid of any evidence on several points, and that the conviction was ". . . based upon no evidence of guilt. . . ." (Pet. p. 8.)

1(a) Petitioner contends that:

> "No evidence was introduced that this men's toilet was a 'public place or a place open to the public or a place exposed to public view' as set forth in the statute." (Pet. p. 8.)

The record does not support this contention. The evidence shows that the petitioner, while eating at the restaurant, desired to use the men's room. He proceeded to do so. [Rep. Tr. p. 19, lines 14-15.] The police officer, also a patron of this restaurant, used the same restroom. A logical inference to be drawn from these facts is that this restroom was provided for and used by the patrons of the restaurant.

Even if it is assumed that there were no toilet facilities provided specifically for the use of the public, the fact that both the officer and the petitioner used the restroom indicates that whenever one of the patrons desired to use this men's room he was permitted to do so.

The court will not presume, without other evidence, that they committed a trespass.

> *People v. Garnett*, 148 Cal. App. 2d 280, 306 P. 2d 571;
>
> *Mercurio v. Dept. of Alcoholic Beverage Control*, 144 Cal. App. 2d 626, 301 P. 2d 474.

This use would indicate that this men's room was open to the public.

1(b) Section 28547 of the California Health and Safety Code does not create a statutory presumption that the restroom in question ". . . was reserved for the private use of the employees of the restaurant", as petitioner contends. (Pet. p. 8.)

This section reads as follows:

> "Toilet facilities shall be provided convenient to the employees on the premises. Where there are five or more employees of different sex, separate toilets shall be provided for each sex. Toilet rooms shall be separated from other portions of the restaurant by tight fitting, self-closing doors." (Health & Safety Code, Sec. 28547; Stats. 1961, ch. 633, Sec. 2, p. 1816.)

The fact that California requires all restaurants have toilet facilities on the premises for the use of their employees does not create a statutory presumption that these toilet facilities or any other on the premises are for the sole and exclusive use of the employees of the restaurant.

2. The petitioner states there was no testimony that a member of the public observed the petitioner engaging in this lewd conduct and then complained to the police. (Pet. p. 8.) The observation by a member of the public is not a requirement of the statute but rather an evidentiary requirement, one of proving that the criminal conduct occurred.

Although it is not necessary that this conduct be observed by a ". . . member of the public . . ." there should be no question that the arresting officer, while on duty with the Los Angeles Police Department [Rep. Tr. p. 3, lines 3-14], was a member of the public.

3. The petitioner contends there was no evidence introduced that the petitioner solicited any person to engage in lewd or dissolute conduct. (Pet. p. 9.) Assuming this is a correct statement of the facts, this will not change the decision. The petitioner was con-

victed, not of soliciting one to engage in the proscribed conduct, but rather was convicted of engaging in that conduct.

The statute is phrased in the disjunctive and therefore the proof of either one of the proscribed acts is sufficient for conviction. (*People v. Turner*, 185 Cal. App. 2d 513, 8 Cal. Rptr. 285). Here there is ample proof that the petitioner engaged in lewd conduct [Rep. Tr. p. 8, lines 7-10] and hence there is no need for proof that the petitioner solicited such conduct.

4. The petitioner contends that "solitary masturbation has not been designated as criminal conduct or as a 'lewd or dissolute act' in California, either by statute or case law." This question is not before the court.

Here the masturbation took place before the eyes of a member of the public, while the petitioner was in a place exposed to public view. [Rep. Tr. p. 8, lines 7-10.] Hence, this was not "solitary" masturbation.

II.

The California Statute Declaring That No Person Shall Engage in a Lewd or Dissolute Act in Public Is Definite and Certain, and a Valid Penal Statute (Both on Its Face and as Applied to the Petitioner).

The petitioner was charged and convicted of a violation of Section 647(a) of the California Penal Code, which prohibits engaging in "lewd or dissolute conduct."

1. He contends "the terms of the statute 'lewd or dissolute' are so vague and indefinite that it is virtually impossible to draw the line between criminal and innocent conduct." (Pet. p. 13.)

Both of these words have a clear and well defined meaning. As the court stated in the case of *People v. Babb*, 103 Cal. App. 2d 326, 229 P. 2d 843:

> "'Lewd' and 'dissolute' are terms often used interchangeably. Each applies to the unlawful indulgence in lust whether in public or private. 'Lewd' is defined to mean, 4. 'Lustful' libidinous; lascivious; unchaste.' 'Dissolute' is defined to mean, '2' . . . loose in morals and conduct; wanton; lewd; debauched.'"

This same definition was given in *People v. Scott*, 113 Cal. App. Supp. 778, 780, 296 Pac. 601, and *In re McCue*, 7 Cal. App. 705, 96 Pac. 110.

As stated in *Roth v. United States*, 354 U. S. 476, 491:

> "This court however, has consistently held that lack of precision is not itself offensive to the requirements of due process. 'The constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' *United States v. Petrillo*, 332 U. S. 1, 7, 8, 91 L. ed. 1877, 1883, 67 S. Ct. 1538."

Furthermore, petitioner's jurisdictional statement does not indicate nor does the record disclose that these points were raised at either the trial or appellate level.

It is a general rule of California appellate review, early established and long adhered to, that questions

not raised in the trial court will not be considered on appeal.

People v. Alvidrez, 158 Cal. App. 2d 299, 322 P. 2d 557;

MacKenzie v. Angle, 82 Cal. App. 2d 254, 186 P. 2d 30.

2. Petitioner contends "there is no requirement of knowledge in the statute under which petitioner was convicted." (Pet. p. 13.)

Section 20 of the California Penal Code states:

> "In every crime or public offense there must exist a union, or joint operation of act and intent or criminal negligence."

A person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and must be presumed to intend all the material, probable and usual consequences of his voluntary acts.

People v. Kenosa, 109 Cal. App. 2d 793, 241 P. 2d 628.

Unless a person be an abject lunatic or a person of very tender years, he intends the natural and probable consequence of his own acts. Petitioner is neither, and by engaging in this lewd act he intended to act in this manner. Thus, to hold that one may not engage in lewd conduct in public is but to proscribe an act which the petitioner intended.

The complaint charging the violation alleged that the proscribed conduct was performed "wilfully."

"Wilfully" is defined in California Penal Code Section 7(1), as:

> "The word 'wilfully' when applied to the intent with which an act is done or committed, implies simply a purpose or willingness to commit the act, or make the omission referred to."

Thus, although this statute does not contain the express requirement that the petitioner be required to know that what he was doing constituted a violation of the law, the respondent had to, and did, prove that petitioner did the act with the requisite criminal intent.

III.

The Supreme Court of the United States Should Not Grant Certiorari Where the Petitioner Has Failed to Raise the Constitutional Issues in the State Courts.

The petitioner has attempted to raise four Federal issues in his Petition for Writ of Certiorari. Rule 23 (1), (Supreme Court of the United States Revised Rules) requires that the Petition must "... specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the Federal questions sought to be reviewed were raised . . . with specific reference to the places in the record where the matter appears . . . so as to give this court jurisdiction to review the judgment on Writ of Certiorari."

The petitioner has failed to comply with this rule. A search of the entire record indicates that the Federal issues raised in the Petition were never presented to or considered by the California courts.

This court recently affirmed the long-standing rule that the appellate jurisdiction of the Supreme Court of the United States over a state court cannot be based upon the alleged denial of a Federal right when that right was never urged in the trial court nor raised in or decided by the state appellate court.

Beck v. Washington, 369 U. S. 541.

IV.

The Supreme Court of the United States Should Not Take Jurisdiction to Review a Judgment Where No Opinion Was Delivered by the Highest State Court, and Where Such Judgment Is Sustainable on Non-Federal Grounds.

No opinion was delivered by the highest state court that could review the judgment. (Pet. 1.)

In *Stembridge v. State of Georgia*, 343 U. S. 541, it was held that, where the highest court of the state delivers no opinion and it appears the judgment might have rested upon a nonfederal ground, this court will not take jurisdiction to review the judgment.

The judgment of the Appellate Department of the Superior Court, as to petitioner's contention that Section 647(a) of the Penal Code is unconstitutionally vague and indefinite (on its face and as applied), could have rested upon the nonfederal ground that since the petitioner failed to raise these issues at either the trial or appellate level the court need not consider them.

People v. Aldridge, 158 Cal. App. 2d 299, 322 P. 2d 557;

California Rules of Court Rule 184(b) (Appx. A.)

This would also be a justifiable ground to refuse to consider petitioner's claim (raised for the first time in this court) that Section 647(a) violates the *ex post facto* clause of the United States Constitution. (Art. I, Sec. 10 of the U. S. Const.)

The only issue which petitioner raises now and which petitioner attempted to raise in the state appellate courts

is his contention there was a lack of evidence to sustain the judgment.

However, as the statement of facts shows, the evidence was more than adequate to sustain the judgment and hence, this issue was also sustainable upon a state ground.

People v. Nearland, 15 Cal. 2d 678, 104 P. 2d 778.

Conclusion.

It is urged that the Petition for Writ of Ceriorari be denied.

Respectfully submitted.

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APPENDIX A.

Rule 184. Statement or Transcript.

(a) Where a consideration of the evidence or any part thereof, or of any proceedings which do not otherwise constitute a part of the record on appeal as defined in rule 183, is necessary to a determination of the appeal, the same must be set forth in a statement on appeal settled and certified as provided in these rules, and if not so set forth, it shall be presumed that they were such as to support the judgment or order appealed from. If all or any part of such evidence or other proceedings was reported by an official reporter, the appellant may give notice in his proposed statement that he intends to file a reporter's transcript of the evidence and proceedings so reported, and to make the same a part of the statement, and if he gives such notice he may omit any other statement of the evidence and proceedings so reported from his proposed statement.

(b) In every such statement the appellant shall specify the grounds on which he intends to rely upon appeal and set forth so much of the evidence and other proceedings as are necessary for a decision upon said grounds. Said grounds of appeal shall be stated with sufficient particularity to apprise the court and the opposing party of the rulings or other matters of which the appellant intends to complain, but this may be done by any general description calling attention to the points to be made, without specifying each separate ruling or other matter to be complained of. If one of said grounds of appeal is insufficiency of the evidence, the particulars in which it is insufficient shall also be stated, unless a reporter's transcript con-

taining the whole thereof is to be made a part of the statement. No ground of appeal not so specified shall be considered by the superior court unless it shall appear to the satisfaction of said court that the record on appeal fairly and fully presents the evidence and other proceedings necessary for a decision thereon.

(c) It shall not be necessary in any such statement or transcript to copy any exhibit, instruction, order, affidavit, paper or document on file with the trial court, but the same may be merely referred to by any designation sufficient to identify it. If any point is to be made on appeal as to the giving, refusal or modification of instructions, it shall be necessary to show by said statement or transcript whether any oral instructions where given and, if so, what they were, and by whom requested, and if the written instructions included in the record under rule 183 do not show by whom requested, or what modifications were made in instructions given as modified, these facts shall be set forth in the statement.

(d) If the appellant desires to have a statement settled, he shall, within five days after filing notice of appeal, serve on the respondent and file with the trial court a proposed statement on appeal. If in such proposed statement appellant gives notice that a reporter's transcript is to be filed and made a part thereof, as provided in subdivision (a) of this rule, he may file or cause to be filed, within 15 days after the filing of his proposed statement, a transcript of the evidence or other proceedings reported by an official reporter, certified by that reporter to be correct, and shall within 2 days after such filing, notify the respondent thereof. Any such transcript when settled and

certified as provided in rule 187, shall be deemed and become a part of the statement. If the transcript is not filed or notice is not given of its filing within the time limited by these rules or any lawful extension thereof, the appellant's right to have such transcript settled and certified as a part of his statement shall at once terminate and the trial court shall proceed upon the other parts of the proposed statement as provided in rule 187. If the failure to file such transcript in time results from the refusal, failure or inability of the reporter to make all or any part of the transcript, the appellant may within five days after expiration of the time for filing such transcript move the trial court for leave to file amendments to his statement to cover the matters originally proposed to be in such transcript. If the trial court grants such motion, the appellant shall serve and file such amendments within five days after the making of the order granting leave thereto, and such amendments and the original statement shall be settled and certified as provided in rule 187. If the appellant fails to serve and file a proposed statement on appeal within the time limited by these rules or any lawful extension thereof, his right to have such a statement settled and certified shall forthwith terminate. [As amended effective Jan. 6, 1947, previously amended effective July 31, 1938.]